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MICHAEL T. BLATT,

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

11 LIBERTY MUTUAL INSURANCE  
12 COMPANY,  
13 Plaintiff,  
14 v.  
15 MICHAEL T. BLATT,  
16 Defendant.  
17

) Case No. C 06 2022 SC  
) **DEFENDANT MICHAEL T.**  
) **BLATT'S MEMORANDUM**  
) **OF POINTS AND**  
) **AUTHORITIES IN SUPPORT**  
) **OF MOTION FOR RELIEF**  
) **FROM ADMISSIONS**  
)  
) Date: October 26, 2007  
) Time: 10:00 a.m.  
) Courtroom: 1, Hon. Samuel  
) Conti, Sr.

Trial Date: November 19, 2007

Defendant MICHAEL T. BLATT (“Blatt”) submits the following memorandum of points and authorities in support of his motion for relief from admissions.

## STATEMENT OF FACTS

This is an insurance coverage action that arises out of Liberty Mutual's defense of defendant Michael Blatt in an underlying construction defect action. The matter has been fully briefed in Liberty Mutual's Motion For Summary Judgment. This Motion For Relief From Admissions should be

1 decided by the Court as part of Defendant's Opposition to the Motion For  
2 Summary Judgment.

3 In its Reply Brief in support of its Motion For Summary Judgment,  
4 Liberty Mutual attached Requests for Admissions as evidence in support of its  
5 motion. Liberty Mutual did not rely upon these purported admissions at the  
6 time of filing its Motion for Summary Judgment, as its supporting evidence.  
7 As described in the supporting declaration of attorney Ronald D. Foreman,  
8 Blatt served verified responses to the Request For Admissions and a Special  
9 Interrogatory on October 4, 2007. As such, Blatt has complied with the  
10 discovery requests. However, Blatt seeks relief from the claimed admissions as  
11 plaintiff is taking the position that the Request For Admissions have been  
12 deemed admitted. Blatt seeks relief based upon Fed. R. Civ. Pro. 36 (b) and  
13 Fed. R. Civ. Pro. 60.

14 Liberty Mutual served Request for Admissions, Set One and Special  
15 Interrogatory, Set One on July 18, 2007. As explained in the declaration of  
16 attorney Ronald D. Foreman, Liberty Mutual agreed to extend the time for  
17 responses and then unilaterally declared, without warning, that the admissions  
18 were deemed admitted on October 4, 2007. Counsel for Blatt relied upon the  
19 agreed to discovery extensions and once notified of the declared default in  
20 responding to the Request For Admissions (and Special Interrogatory), served  
21 verified responses within *5 hours* of the declare of default. (See **Exhibit 1** and  
22 **Exhibit 2** to the supporting Declaration of attorney Ronald D. Foreman)

23 Although Fed R. Civ. Pro. 36 (b) states that admissions are deemed  
24 admitted if not timely responded to, it is clear from the exchange of emails  
25 attached to the declaration of Ronald D. Foreman that the parties mistakenly  
26 treated plaintiff's Request For Admissions as though they were served in  
27 accord with Calif. Code of Civil Procedure 2033.010 in which parties can  
28 stipulate to extend the time for making discovery responses, with impunity.

1 That mutual mistake is now being used as a sword by Liberty Mutual against  
 2 Michael Blatt. Consequently, the requested Relief From Admissions is soundly  
 3 based upon the authorities set forth hereinafter and Fed. R. Civ. Pro. 60, which  
 4 provides for relief based upon a mistake, inadvertence and excusable neglect.

## 5 **LEGAL ARGUMENT**

6 An admission may be amended or withdrawn by leave of court on  
 7 noticed motion. This applies both to express admissions and those resulting  
 8 from a failure to respond. Fed. R. Civ. Proc. 36(b); *999 C.I.T. Corp.* (9<sup>th</sup> Cir.  
 9 1985) 776 F.2d 866, 869.

10 The Court will allow relief if the withdrawal will aid in presentation of  
 11 the merits of the case; no substantial prejudice to the requesting party will  
 12 result from allowing the admission to be withdrawn and the Request For Relief  
 13 is timely made<sup>1</sup>. Fed. R. Civ. Proc. 36(b).

14 Although it is anticipated that plaintiff may claim a form of prejudice by  
 15 the delayed service of the responses to Request For Admissions and Special  
 16 Interrogatory, that is truly not the case, as the verified responses were served  
 17 on October 4, 2007, 5 hours after defendant received notice that plaintiff was  
 18 endeavoring to declare a default. (See the Declaration of Ronald D. Foreman  
 19 in support of this Motion, Paragraphs 2-6.)

20 The defendant cannot assert “substantial prejudice” simply because an  
 21 admitted fact will have to be proven at trial. A party must show some increased  
 22 difficulty in proving the previously admitted fact, such as the unavailability of  
 23 a witness. *Sonoda v. Cabrera* (9<sup>th</sup> Cir. 2001) 255 F.3d 1035, 1039; *Farr Man*  
 24 & Co. v. M/V *Rozita* (1<sup>st</sup> Cir. 1990) 903 F.2d 871, 876; *Perez v. Miami-Dade*  
 25 *County* (11<sup>th</sup> Cir. 2002) 297 F.3d 1255, 1264—[error to deny leave where no  
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27 <sup>1</sup>This Motion For Relief From Admissions was made 15 days after defendant received notice that it was  
 28 declaring the Request For Admissions deemed admitted and on the last day for hearing of regularly scheduled motions  
 as entered by the Court on August 30, 2007.

1 substantial prejudice shown, even if motion untimely]; *Raiser v. Utah County*  
 2 (10<sup>th</sup> Cir. 2005) 409 F.3d 1243, 1246—[“preparing a summary judgment motion  
 3 in reliance upon erroneous admission does not constitute prejudice”].

4 Most courts hold that the prejudice must relate to the difficulty the  
 5 opposing party may face in proving its case at trial. Therefore, reliance on a  
 6 deemed admission in preparing a summary motion does not, by itself,  
 7 constitute sufficient prejudice to justify denial of a motion to withdraw the  
 8 admission. *Conlon v. United States* (9<sup>th</sup> Cir. 2006) 474 F.3d 616.

9 As set forth in the Declaration of Ronald D. Foreman in support of this  
 10 Motion, Paragraphs 8-13, it is demonstrated why plaintiff cannot meet the  
 11 legally mandated prejudice contemplated by Fed. R. Civ. Pro 36 (b). On the  
 12 other hand, defendant Michael Blatt definitively demonstrates the prejudice he  
 13 will suffer if the automatic admissions are not deemed withdrawn and the  
 14 October 4, 2007 responses deemed operative. The recent decisions in  
 15 *Salisbury v. Detective Michael Ward* (2007) U.S. Dist. LEXIS 51375 and  
 16 *Allen v. The Ghoulish Gallery* (2007) U.S. Dist. Lexis 54197 support  
 17 defendant Michael Blatt’s Request For Relief.

18 The Court has broad discretion in granting relief. The Motion For Relief  
 19 should be granted because upholding the automatic admissions would  
 20 practically eliminate any presentation of the merits of the case or the  
 21 affirmative defenses. And as established in the supporting Declaration of  
 22 Ronald D. Foreman, it is apparent that the parties were operating under a  
 23 stipulation extending the time within which to respond to discovery, which  
 24 was unilaterally terminated by plaintiff’s counsel without warning. Once  
 25 plaintiff’s counsel terminated the extension, defendant promptly served  
 26 verified responses on October 4, 2007.

## 27 CONCLUSION

28 Based on the foregoing, it is respectfully requested that defendant’s

1 motion for Relief From Admissions be granted, that defendant's automatic  
2 admissions be deemed withdrawn and the responses to Request to Admit Nos.  
3 1-14 served on October 4, 2007, be deemed operative

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5 DATED: October 19, 2007

FOREMAN & BRASSO

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By:

/s/

Ronald D. Foreman  
Attorneys for Defendant  
Michael T. Blatt

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